

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 19-4161, 19-4162, 19-4163, 19-4164, 19-4165, 19-4166, AND 19-4183

CITY OF EUGENE, OREGON, ET AL.,

PETITIONERS,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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REQUEST FOR ORAL ARGUMENT

The FCC respectfully requests oral argument, pursuant to 6th Cir.

R. 34(a), to address the issues of constitutional, statutory, and administrative law raised by the petitions.

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BRIEF FOR RESPONDENTS

INTRODUCTION

Title VI of the Communications Act establishes the basic terms of a bargain—a cable company may apply for and obtain a franchise to access and operate facilities in the local rights-of-way, and in exchange, a franchising authority may impose fees and other requirements, as provided for in the Act. Congress enacted Title VI to “continue[] reliance on the local franchising process as the primary means of cable television regulation, while defining and limiting the authority that a franchising authority may exercise through the franchise process.” *All. for Cmty. Media et al.*, 529 F.3d 763, 768 (6th

Cir. 2008). In the Order on review, the Federal Communications Commission (“Commission”) faithfully implemented those limits in light of the statute’s text, structure, and legislative history, as well as this Court’s direction in *Montgomery County, Maryland v. FCC*, 863 F.3d 485 (6th Cir. 2017). Specifically, the Commission explained that: (1) “franchise fees” paid by cable operators to franchising authorities, which the Act caps at five percent of a cable operator’s cable revenues, include cable- as well as non-cable-related, “in-kind” contributions; and (2) the “mixed-use rule,” which prohibits franchising authorities from regulating the non-cable services and facilities of cable operators, applies to all cable operators, not just those that are also telecommunications carriers. The Commission next preempted state and local franchising regulations that are inconsistent with the Act, including regulations that impose additional fees, or require an additional franchise, for the non-cable services of cable operators. Finally, the Commission extended its franchising rules and decisions to state as well as local franchising actions.

Petitioners and their supporting intervenors raise numerous challenges to these decisions. But each of the Commission’s decisions was reasonable, reasonably explained, and consistent with the Act’s text, structure, and legislative history. Accordingly, the petitions for review should be denied.

JURISDICTION

The *Order* on review was released on August 2, 2019, and a summary thereof was published in the *Federal Register* on August 27, 2019. *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 34 FCC Rcd 6844 (2019) (“*Order*”); 84 Fed. Reg. 44725. Petitions for review of the *Order* were timely filed in the Third, Ninth, and D.C. Circuits. Pursuant to 28 U.S.C. § 2112(a)(5), the petitions were transferred to the Ninth Circuit, and on November 29, 2019, that Court granted the Commission’s motion to transfer the petitions to this Court, and the petitions were consolidated. This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTIONS PRESENTED

1. Whether the Commission reasonably interpreted the Act to provide that cable-related, in-kind contributions are “franchise fees” subject to the statutory cap on such fees.

2. Whether the Commission reasonably applied its mixed-use rule to all incumbent cable operators, whether or not they also operate as common carriers, so that franchising authorities are prohibited from regulating non-cable services offered over incumbent cable operators’ cable systems, except as expressly permitted by the Act.

3. Whether the Commission lawfully preempted regulation of cable operators' non-cable services by states and localities.

4. Whether the Commission reasonably applied its franchising rules and decisions to state-level franchising.

STATUTES AND REGULATIONS

The pertinent statutes and regulations are attached in an addendum to this brief.

COUNTERSTATEMENT

I. STATUTORY BACKGROUND

Any company seeking to offer “cable service” as a “cable operator” is subject to the provisions of Title VI of the Communications Act, 47 U.S.C. §§ 521-573. 47 U.S.C. § 522(6), (7). As relevant here, the Act empowers local franchising authorities to grant franchises, *id.* § 541(a)(1), which “shall be construed to authorize the construction of a cable system over public rights-of-way and through easements....” *Id.* § 541(a)(2). A cable operator is prohibited from providing cable service in a given area without first obtaining a cable franchise from that area’s franchising authority. *Id.* § 541(b).

A franchising authority may condition the grant of a franchise on a cable operator’s provision of certain facilities and services, including by “establish[ing] requirements ... with respect to the designation or use of channel capacity for public, educational, or governmental use.” *Id.* § 531(a).

In addition, “[i]n awarding a franchise,” it may require “adequate assurance” that the franchisee will provide “adequate public, educational and governmental access channel capacity, facilities, or financial support.” *Id.* § 541(a)(4)(B). A franchising authority may also impose a “build-out” obligation that requires a cable operator to extend its cable system throughout the franchise area, *id.* § 541(a)(4)(A), and comply with “customer service standards,” *id.* § 552. In return for use of the public rights-of-way, a franchising authority may charge cable operators a “franchise fee,” which the Act defines as “any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such.” *Id.* § 542(g)(1). That fee is capped at five percent of a cable operator’s annual gross revenues from the provision of cable service. *Id.* § 542(b).

Franchising authorities “do not have unlimited discretion in negotiating, granting, and denying franchises.” *Montgomery County*, 863 F.3d at 487. They “may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [Title VI].” 47 U.S.C. § 544(a)(1). To enforce that restriction, the Act preempts franchising laws and franchise provisions that are “inconsistent with [the Communications Act],” *id.* § 556(c), while preserving the franchising

authorities’ ability to address “matters of public health, safety, and welfare,” *id.* § 556(a).

II. REGULATORY BACKGROUND

A. The *First Report and Order*

In 2007, the Commission made it easier for new applicants (notably, telephone companies) to obtain a cable franchise. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd 5101 (2007) (“*First Report and Order*”). Two of those actions are relevant here. First, the Commission interpreted the term “franchise fee” in section 622(g)(1) of the Act to include all requests unrelated to the provision of cable services by a new entrant, including non-cash “in-kind” contributions. *First Report and Order* ¶¶ 105-108.

Second, the Commission held that franchising authorities may not “regulate” a new entrant’s “entire network beyond the provision of cable services.” *Id.* ¶¶ 121-122. The Commission derived this prohibition (the “mixed-use rule”) from the Act’s definition of “cable system,” which provides that the facility of a “common carrier” is only a cable system “to the extent that” it distributes “video programming directly to subscribers.” *Order* ¶ 122 (JA__); 47 U.S.C. § 522(7)(C).

This Court denied petitions for review of the *First Report and Order* in *Alliance for Community Media*.

B. The *Second Report and Order* and *Reconsideration Order*

Shortly thereafter, the Commission extended that Order’s franchise fee and mixed-use rulings to incumbent cable operators, concluding that the statutory provisions on which its rulings were based apply equally to incumbents as to new entrants. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 22 FCC Rcd 19633, 19637-19638, 19640-19641 (¶¶ 10-11, 16-17) (2007) (“*Second Report and Order*”).

Several franchising authorities sought administrative reconsideration. In response, the Commission clarified that in-kind exactions are franchise fees even when they are related to the provision of cable services. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 30 FCC Rcd 810, 814-816 (¶¶ 11-13) (2015) (“*Reconsideration Order*”). It also reaffirmed that the mixed-use rule applies to incumbent cable operators, and thus bars franchising authorities from regulating the non-cable services and facilities of incumbents as well as new entrants. *Id.*, 30 FCC Rcd at 816 (¶¶ 14-15).

3. This Court in *Montgomery County*, 863 F.3d at 490-492, vacated and remanded the franchise fee ruling in the *Second Report and Order*, as

affirmed in the *Reconsideration Order*. The Court agreed with the Commission that the statutory term “franchise fee” “can include non-cash exactions,” but held that the agency had not explained why *cable-related*, in-kind contributions are “non-cash exactions” that should be treated as franchise fees. *Id.* at 491. “On remand,” the Court directed, “the FCC should determine and explain anew whether, and to what extent, cable-related exactions are ‘franchise fees’ under the Communications Act.” *Id.* at 492.

The Court also held that the Commission erred in applying the mixed-use rule to incumbent cable operators. The Court explained that because the mixed-use rule is based on section 602(7)(C) of the Act, 47 U.S.C. § 522(7)(C), which “applies only to Title II carriers,” it cannot cover the “many incumbent cable operators [that] are not Title II carriers.” *Id.* at 493. The Court thus vacated and remanded the rule as applied to incumbent cable operators that are not also common carriers, and directed the Commission to “set forth a valid statutory basis ... for the rule as so applied.” *Id.*

III. THE *ORDER* ON REVIEW

The *Order* responded to this Court’s remand in *Montgomery County*. In it, the Commission reaffirmed and explained its previous conclusion that cable-related, in-kind contributions are “franchise fees” subject to the statutory cap on franchise fees. *Order* ¶¶ 8-63 (JA____-____). The Commission

also reaffirmed its mixed-use rule and explained the statutory basis for the rule’s application to both common carrier and non-common carrier incumbent cable operators. *Id.* ¶¶ 66-71; ¶¶ 72-78 (JA____, ____; ____-____). In addition, the Commission preempted certain state and local franchising requirements that are inconsistent with Title VI, and extended its franchising rules and orders to state-level franchising. *Order* ¶¶ 80-104; ¶¶ 111-114 (JA____, ____; ____-____).

A. Franchise Fees

The Commission first found no statutory basis for exempting all cable-related, in-kind contributions from the statutory cap on franchise fees. *Id.* ¶ 14 (JA____). It explained that the statute broadly defines a “franchise fee” as “any tax, fee or assessment of any kind,” with no “no general exemption for cable-related, in-kind contributions.” Instead, there are five narrow exceptions, only two of which address cable-related, in-kind contributions—*i.e.*, payments for, or the use of, “public, educational and governmental access facilities” (for franchises in effect on October 30, 1984) and capital costs that must be incurred for such facilities (for franchises granted after October 30, 1984). *Id.* ¶¶ 14-15 (JA____) (citing 47 U.S.C. § 542(g)(2)(B), (C)). The Commission reasoned that Congress’s decision to carve-out specific types of cable-related contributions necessarily meant that any other such contribution is a

“franchise fee.” *Order* ¶ 16 (JA ____). Indeed, the Commission explained, those exceptions would be unnecessary if all cable-related contributions were already excluded. *Id.* The Commission codified its interpretation of “franchise fee” in its rules. 47 C.F.R. § 76.42.

The Commission then addressed specific types of in-kind contributions.

PEG Access Facilities. Section 611 of the Act provides that franchising authorities “may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use,” including “require[ing] ... that channel capacity be designated for public, educational, or governmental use.” 47 U.S.C. § 531(a), (b).

The Commission held that such PEG-related, non-monetary contributions required by franchising authorities qualify as “franchise fee[s],” with the exception of specific PEG “payments” for “franchises in effect on October 30, 1984,” and “capital costs” for “franchises granted after October 30, 1984,” which were exempted in section 622(g)(2)(B) and (C), *id.* § 542(g)(2)(B), (C). Holding that PEG-related, non-monetary contributions are covered by the franchise fee cap unless specifically excluded, the Commission explained, “is consistent with the statute and reasonably

effectuates Congressional intent” to define franchise fees “broadly.” *Order* ¶ 28 (JA___).

Institutional Networks (I-Nets). Section 611(b) of the Act, 47 U.S.C. § 531(b), provides that franchising authorities “may require” that “channel capacity on institutional networks be designated for educational or governmental use.” An I-Net is “a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers.” *Id.* § 531(f).

The Commission concluded that a cable operator’s obligation to construct, maintain, and provide service on an I-Net under the terms of a franchise agreement constitutes a “franchise fee”: it is cable-related; it is an in-kind contribution imposed by the cable operator; and it is not included in any of the franchise fee exceptions in section 622(g)(2). *Order* ¶ 55 (JA___). As the Commission noted, Congress enacted the I-Net and franchise fee provisions in the Act at the same time, yet did not exclude I-Nets from the franchise fee definition. *Id.*; *see id.* ¶ 20 (JA___).

Build-Out Obligations. Many franchises require cable operators to construct facilities to serve localities within the area covered by the franchise (“build-out obligations”). Observing that section 621(a)(2)(B), 47 U.S.C. § 541(a)(2)(B), requires cable operators to bear the cost of constructing and

operating their cable systems, the Commission concluded that it would be inconsistent with the “statutory text and structure” of the Act to treat build-out requirements as franchise fees. *Order* ¶ 57 (JA____).

Customer Service Standards. Finally, the Commission held that franchise terms that require cable operators to comply with customer service standards do not qualify as franchise fees. *Id.* ¶ 58 (JA____). The Commission explained that those requirements are “regulatory standards that govern how cable operators are available to and communicate with customers,” and for that reason, they are “not a ‘tax, fee, or assessment.’” *Id.*

Valuation of In-Kind Contributions. Having concluded that most cable-related, in-kind contributions are franchise fees, the Commission recognized that they would have to be assigned a value for purposes of the franchise fee cap. The Commission decided to use the “fair market value” of such contributions. *Id.* ¶ 59 (JA____). That amount, the Commission explained, reflects the rate that franchising authorities would have to pay for cable-related facilities and services from the cable operator or third parties if the authorities could not demand them on an in-kind basis as part of the franchise. *Id.* ¶ 61 (JA____).

B. The Mixed-Use Rule

In readopting its mixed-use rule, the Commission affirmed its conclusion, which this Court left intact in *Montgomery County*, 863 F.3d at 492-493, that the rule properly applies to cable operators that are common carriers—*i.e.*, those that provide telecommunications services. *Order* ¶ 68 (JA____). The Commission again relied on section 602(7)(C) of the Act, 47 U.S.C. § 522(7)(C), which excludes from the term “cable system” “a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of this Act.” *Id.* ¶ 69 (JA____).

The Commission also extended the mixed-use rule to cable operators that are not common carriers—*i.e.*, those cable operators that provide only non-cable, non-telecommunications services in addition to cable service. (Non-cable services include, but are not limited to, “information services,” such as broadband Internet access service. *Id.* n.257, ¶ 74 (JA____, ____)). The Commission based that holding on section 624(b)(1) of the Act, 47 U.S.C. § 544(b)(1), which provides that a franchising authority “may not ... establish requirements for video programming or other information services.” *Order* ¶¶ 72-79 (JA____ - ____).

The Commission found additional support for that conclusion in the legislative history of the 1984 Cable Act, which added Title VI to the

Communications Act. That history contains numerous statements expressing Congress’s intent to “preserve the *status quo* with respect to federal, state, and local jurisdiction over non-cable services.” *Id.* ¶ 76 (JA____). Observing that the FCC traditionally has had exclusive authority over interstate information services, the Commission determined that allowing franchising authorities to regulate those services “would be fundamentally at odds with Congressional intent.” *Id.*; *id.* ¶ 71 (JA____).

C. Preemption of Conflicting State and Local Regulations

In response to “ample record evidence” that states and localities were regulating cable operators’ non-cable services, the Commission preempted “any state or local requirement, whether or not imposed by a franchising authority, that would impose obligations on franchised cable operators beyond what Title VI allows.” *Id.* ¶ 80 (JA____). In doing so, the Commission invoked section 636(c) of the Act, 47 U.S.C. § 556(c), which provides that “any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.”

The Commission addressed two specific categories of state and local regulations. *Order* ¶ 88 (JA____).

Additional Franchise Fees. First, the Commission preempted fees imposed on cable operators’ non-cable services. *Id.* ¶¶ 89-93 (JA____ - ____).

The Commission relied on section 622(g)(1)’s definition of “franchise fee,” which includes “any tax, fee, or assessment of any kind imposed ... on a cable operator ... solely because of [its] status as such.” *Order* ¶ 90 (JA____); 47 U.S.C. § 542(g)(1). Because cable operators provide non-cable services using the cable systems that they manage and operate, the Commission concluded that fees assessed on cable operators’ non-cable services are imposed “solely because of their status” as cable operators and thus that those fees are capped. *Order* ¶ 91 (JA____).

Additional Franchises or Other Requirements. Relying on provisions in the Act that bar franchising authorities from regulating cable operators’ provision of telecommunications services, *see* 47 U.S.C. § 541(b)(3)(D), and information services, *id.* § 544(b)(1), the Commission also preempted “any state or local law or legal requirement” that requires “a cable operator franchised under Title VI” to obtain a separate franchise to provide non-cable services, such as broadband Internet access services, over its cable system. *Order* ¶¶ 99, 100 & n.376 (JA____, ____ & ____).

Public policy considerations. The Commission determined that duplicative fees and franchise requirements were contrary to the public

interest based on record evidence that they diminished cable operators’ investment in broadband infrastructure. *Id.* ¶ 104 (JA ____).

D. State-Level Franchising

Finally, the Commission concluded that its franchising rules and decisions should “apply to franchising actions taken at the state level and state regulations that impose requirements on local franchising.” *Id.* ¶ 111 (JA ____). The Commission observed that the Act “does not distinguish between state and local franchising authorities.” *Id.* ¶ 114 (JA ____). Instead, it defines a “franchising authority” as “any governmental entity empowered by Federal, State or local law to grant a franchise,” 47 U.S.C. § 522(10), and expressly preempts “any provision of law of any State, political subdivision, or agency thereof, or franchising authority,” that conflicts with the Act. 47 U.S.C. § 556(c). The Commission determined that there was no “policy reason” to limit its decisions to local authorities, noting that state-level actions can cause the same harmful effects as the local actions that it addressed in its prior Orders. *Order* ¶ 114 (JA ____).

IV. SUBSEQUENT DEVELOPMENTS

On October 7, 2019, several organizations representing state and local authorities asked the Commission to stay the *Order*. That motion was denied by the FCC’s Media Bureau. *Implementation of Section 621(a)(1) of the*

Cable Communications Policy Act of 1984, 34 FCC Rcd 10336 (MB 2019) (“*Stay Denial Order*”).

Several petitioners in these consolidated cases then asked this Court to stay the *Order* pending judicial review. Following oral argument, the Court denied the request. The Court explained that “in essence the franchising authorities have asked us to enjoin what appears to be a correct interpretation of a federal statute,” and for that reason, the Court held that “none of the other three factors of the test for preliminary injunctions would allow us to grant the motion here.” *Order* (Mar. 19, 2020), at 4.

SUMMARY OF ARGUMENT

In the *Order* on review, the Commission faithfully adhered to the statutory text, structure, and legislative history in implementing Title VI’s limits on local franchising authorities’ power to regulate and extract payments from cable companies operating within their jurisdictions. Petitioners raise numerous challenges to four determinations by the Commission, none of which has merit.

I. *Franchise Fees*. The Commission reasonably interpreted the statutory term “franchise fee”—which is broadly defined as “any tax, fee, or assessment of any kind”—to encompass non-cash, in-kind contributions made by cable operators to franchising authorities. 47 U.S.C. § 542(g)(1).

That interpretation extended this Court’s determination in *Alliance for Community Media*, 529 F.3d at 782-783, and *Montgomery County*, 863 F.3d at 490-491, that such contributions can be counted as franchise fees.

Relying on the statutory language, the Commission further determined that the term “franchise fee” encompasses *cable-related*, in-kind contributions because the Act does not distinguish between cable-related and non-cable-related, in-kind contributions; instead, it expressly excludes payments for certain PEG requirements. 47 U.S.C. § 542(g)(2). And because those are the only cable-related, in-kind contributions that are excluded, the Commission reasoned that any other such contribution is a “franchise fee.”

In addition, based on the statute’s language and structure, the Commission held that cable-related, in-kind contributions will count against the statutory cap on franchise fees at their fair market value.

A. The Commission’s interpretation of “franchise fee” fits comfortably within the larger framework of the Act. Contrary to Petitioners’ claims, franchising authorities can continue to require PEG access and I-Nets in franchises; the only difference is that the value of those obligations will count against the franchise fee cap. That leaves franchising authorities with substantial discretion to determine how to apply the fees they collect to franchise requirements that satisfy their communities’ needs and interests.

B. Petitioners contend that the Commission treated build-out obligations and other cable-related franchise terms inconsistently. These arguments have been waived because they were not first presented to the Commission. In any event, those arguments, and Petitioners' related claims about the Commission's exclusion of customer service standards, are inconsistent with the statute and otherwise lack merit.

C. Petitioners' remaining challenges to the franchise fee rulings in the *Order* should be rejected.

First, the Commission did not change its position on franchise fees without explanation or fail to consider franchising authorities' reliance interests. Since 2007, the Commission has interpreted the Act to provide that cable-related, in-kind contributions are franchise fees that count against the statutory cap. And for that reason, franchising authorities had no reasonable reliance interests in a contrary view.

Second, the Commission addressed the continuing ability of localities to use I-Nets and PEG access facilities for public safety purposes. The *Order* expanded the exception for PEG capital costs so that more PEG costs are now exempt from the franchise fee cap. The Commission also explained how franchising authorities can maintain access to I-Nets and PEG access facilities after the *Order*.

Third, the Commission reasonably determined that cable-related, in-kind contributions should be assessed against the franchise fee cap based on their fair market value. That measure reflects the amount that a franchising authority would otherwise pay for a facility or service that it receives for free from a cable operator. Nothing in the Act requires the use of cable operators' actual costs instead.

Fourth, the Commission did not adopt a new standard for PEG requirements in the franchise renewal process. The same standard—whether PEG access is “adequate”—applies to initial franchise grants and franchise renewals.

II. *The Mixed-Use Rule.* The Commission properly held that its mixed-use rule bars franchising authorities from regulating the non-cable facilities and services of incumbent cable operators.

The Commission affirmed its conclusion—which this Court did not disturb in *Montgomery County*—that the mixed-use rule applies to incumbent cable operators that also act as common carriers. Though Petitioners argue that the basis for that conclusion (47 U.S.C. § 522(7)(C)) only applies to telephone companies that later provided cable services, the statutory text does not make that distinction.

The Commission also extended the mixed-use rule to cable operators that only provide non-cable, non-telecommunications services (*e.g.*, broadband Internet access services) and thus are not common carriers. Section 624(b)(1), 47 U.S.C. § 544(b)(1), provides that a franchising authority “may not ... establish requirements for video programming or other information services.” Franchising authorities’ general ability to regulate facilities and services under other statutory provisions cannot override that specific restriction.

III. *Preemption.* The Commission properly relied on its express preemption authority under the Act to preempt inconsistent state and local franchise requirements—in particular, fees imposed by states and localities on cable operators’ non-cable services and regulations that require a cable operator with a cable franchise to obtain a second franchise to provide non-cable services. Because the Act expressly bars franchising authorities from regulating cable operators’ non-cable services, the Commission reasonably determined that states and localities are precluded from relying on sources of authority outside of the Act to accomplish indirectly what they are prohibited from doing directly.

Although Petitioners argue that rights-of-way fees that apply to all providers of non-cable services cannot be preempted, because they are not

“franchise fees” under the Act, the cable franchise fee paid by the cable operator already compensates the franchising authority for use of the rights-of-way to construct and operate a cable system that can provide non-cable services. Requiring a cable operator to pay a second fee for rights-of-way access thus is contrary to the Act.

Finally, evidence in the record supported preemption, indicating that duplicative franchise fees and requirements diminish cable operators’ investment in broadband infrastructure, which adversely affects consumer welfare.

IV. *State Franchising Regulations*. The Commission reasonably applied its franchise fee rules and decisions to state-level franchising actions. The Commission rightly observed that there is no statutory basis to distinguish between state and local franchise requirements, and any harm resulting from a franchising regulation that conflicts with the Act and federal policies is the same whether attributable to a state or local franchising authority.

STANDARD OF REVIEW

This Court reviews Petitioners’ challenge to the Commission’s interpretation of the Act under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). If “Congress has directly spoken

to the precise question at issue,” the Court “must give effect to the unambiguously expressed intent of Congress.” *Id.* at 842-43. But “if the statute is silent or ambiguous with respect to the specific issue, the question for the [Court] is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. If the implementing agency’s reading of an ambiguous statute is reasonable, *Chevron* requires this Court “to accept the agency’s construction of the statute, even if the agency’s reading differs from what the [Court] believes is the best statutory interpretation.” *Nat’l Cable & Telecomms. Assn. v. Brand X Internet Svcs.*, 545 U.S. 967, 980 (2005); *see also Alliance for Community Media*, 529 F.3d at 778-86 (deferring to the FCC’s reasonable interpretation of ambiguous provisions in the Act).

Petitioners also challenge the reasonableness of the *Order*. Under the Administrative Procedure Act (“APA”), a Commission order may be “set aside ... only if it is arbitrary, capricious, abusive of discretion or otherwise not in accordance with the law.” *Cellnet Commc’ns v. FCC*, 149 F.3d 429, 436 (6th Cir. 1998); *see* 5 U.S.C. § 706(2)(A). When applying this standard, a court “is not empowered to substitute its judgment for that of the agency.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see Ne. Ohio Reg’l Sewer Dist. v. EPA*, 411 F.3d 726, 732 (6th Cir. 2005),

cert. denied, 126 S. Ct. 2966 (2006). “[T]he arbitrary and capricious standard is deferential toward agency decisions.” *Goldin v. FDIC*, 985 F.2d 261, 263 (6th Cir. 1993). To satisfy it, an agency need only “articulate a rational connection between the facts found and the choice made” and “provide something in the way of documentary support for its actions.” *GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 345 (6th Cir. 2000) (internal quotations omitted).

ARGUMENT

I. THE COMMISSION REASONABLY DETERMINED THAT CABLE-RELATED, IN-KIND CONTRIBUTIONS ARE FRANCHISE FEES SUBJECT TO THE STATUTORY FRANCHISE FEE CAP.

The Act broadly defines a “franchise fee” as “any tax, fee, or assessment of any kind imposed ... on a cable operator ... solely because of [its] status as such.” 47 U.S.C. § 542(g)(1). In *Montgomery County*, 863 F.3d 491-492, this Court upheld the Commission’s determination that a “franchise fee” can include both monetary payments and “noncash exactions,” such as “in-kind” contributions, but determined that the Commission, in its prior order, had failed to explain why *cable-related*, in-kind contributions fall within that definition.

In the *Order*, the Commission provided that explanation. Relying on the text, structure, and legislative history of the Act, the Commission affirmed its earlier conclusion that cable-related, in-kind contributions

required by franchising authorities are “franchise fees” subject to the statutory cap on such fees.

A. A “Franchise Fee” Properly Encompasses Cable-Related, In-Kind Contributions.

For the most part, Petitioners do not challenge the Commission’s (and this Court’s) conclusion that a “franchise fee” can include non-monetary contributions under the broad definition set forth in section 622(g)(1). Instead, they argue that the Commission’s determination that a “franchise fee” can include cable-related, non-monetary contributions is unreasonable within the broader context of the Act. That argument fails. It is the Commission’s interpretation that accords with the statutory text, structure, and history, and because, at a minimum, the Commission’s interpretation of “franchise fee” is a “permissible construction of the Act,” it is entitled to deference. *See Alliance for Community Media*, 529 F.3d at 782.

1. The Commission’s Interpretation Of “Franchise Fee” Does Not Restrict Franchising Authorities’ Ability To Impose Cable-Related Franchise Terms.

Petitioners’ primary argument is that the Commission’s franchise fee ruling undermines franchising authorities’ statutory discretion to impose cable-related obligations in franchise agreements. Eugene Br. 27-28, Portland Br. 28-31. In making this argument, Petitioners rely on section 611(b) of the Act, which permits franchising authorities to require a cable operator to

designate channel capacity “for public, educational or governmental use” and on “institutional networks” for “educational and governmental use.” 47

U.S.C. § 531(b). Given that the Act permits franchising authorities to impose these requirements, they insist, Congress must have intended for cable operators to absorb the cost of them—in addition to the franchise fee that the cable operator is required to pay under section 622(b). Eugene Br. 28-29; Portland Br. 30-31.

Petitioners’ argument is belied by the statutory text. Section 622(g)(1) broadly defines “franchise fee,” while subsection 622(g)(2) carves out limited exceptions (including one for PEG capital costs). This Court has recognized that “if a statute specifies exception to its general application, other exceptions not explicitly mentioned are excluded.” *See In re Robinson*, 764 F.3d 554, 562 (6th Cir. 2014) (citation omitted). Thus, a “tax, fee or assessment” that is not excepted by section 622(g)(2) is covered by section 622(g)(1). As the Commission observed, Congress could have excepted I-Net *and* PEG access requirements from the franchise fee definition; instead, it did not except I-Nets in any respect, and only excepted the “capital costs” of PEG access facilities. *Order* ¶¶ 20, 55 (JA____, ____); 47 U.S.C. § 542(g)(2)(C).

Moreover, if *all* PEG and I-Net requirements were excluded from the definition of “franchise fee,” it would render superfluous the specific

exception for PEG capital costs in section 622(g)(2)(C), in violation of the well-settled interpretive canon that courts must “mak[e] every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.” *Nat’l Air Traffic Controllers Ass’n v. Sec’y of Dep’t of Transp.*, 654 F.3d 654, 657 (6th Cir. 2011) (citations omitted).¹

Petitioners contend that section 622(g)(2)(C)’s purpose is simply to clarify the scope of section 622(g)(2)(B), which excludes all pre-Cable Act PEG requirements from franchise fees. Eugene Br. 29. According to Eugene, without section 622(g)(2)(C)’s exception for PEG capital costs, the section 622(g)(2)(B) carve-out would imply that all PEG requirements (including capital costs) in post-Cable Act franchises are “franchise fees.” *Id.* at 30. But if non-monetary PEG requirements have never been franchise fees, there

¹ Petitioners fare no better in citing an isolated statement in the House Report for the 1984 Cable Act, which discusses section 622(g)(2)(C). That statement is inconsistent with the inclusion of the broad term “assessment” in section 622(g)(1), and would render superfluous the section 622(g)(2)(C) exception for PEG capital costs. *Order* ¶ 18 (JA____). Where there is a “conflict between the language and structure of the statute, on the one hand, and one portion of its legislative history on the other ... the statute must control.” *Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 929 (D.C. Cir. 1985).

would have been no need to except PEG capital costs in section 622(g)(2)(C) in the first place. *Order* ¶ 18 (JA____).

The Act thus permits a franchising authority to impose cable-related, in-kind requirements (including PEG and I-Net obligations), subject to a “budget” equal to the amount of the franchise fee cap. 47 U.S.C. § 542(b). A franchising authority can collect its franchise fee in the form of money, cable-related, in-kind franchise requirements, or a combination of the two. But what it cannot do is demand unlimited cable-related, in-kind contributions in addition to a monetary fee that is equivalent to the amount of the franchise fee cap. That would render the cap illusory. *See Order* ¶ 17 n.77 (JA____).

Next, Petitioners argue that the *Order*’s franchise fee ruling undermines franchising authorities’ obligation to consider whether a franchise renewal proposal “is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.” 47 U.S.C. § 546(c)(1)(D). According to Petitioners, if cable-related, in-kind contributions are “franchise fees” subject to the statutory cap, there is no need to “tak[e] into account” the cost of those requirements. Eugene Br. 30; Portland Br. 28-31.

But the fact that cable-related, in-kind contributions are capped “franchise fees” does not deprive section 626 of practical effect because that

provision still serves to balance a franchising authority's incentive to impose franchise requirements against the burden of those requirements on cable operators and subscribers. *Order* ¶ 21 (JA____). Thus, for example, a franchising authority could determine in the franchise renewal process “that cable-related community needs and interests can be met at a lower cost to cable subscribers than the full five percent franchise fee.” *Id.* Moreover, the community-needs assessment accounts for the cost of franchise requirements that do not count against the franchise fee cap, such as build-out obligations and customer service standards. *Id.* ¶¶ 21, 57-58 (JA____, ____-____).²

Similarly, Petitioners argue that franchising authorities' statutory discretion to “charge the full five percent in franchise fees” eliminates their incentive to opt for “the least expensive franchise requirements.” Eugene Br. 33 (citing 47 U.S.C. § 542(i)). However, whether a franchising authority charges the full amount or not, more of the franchise fee will be available to offset other franchise requirements if it selects a franchise term that fulfills a particular community need at less cost to the cable operator. In addition,

² Thus, contrary to Eugene's assertion, the Commission's reading leaves ample room for franchising authorities to consider “the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber rates” “in assessing costs under [section 626(c)(1)(D)].” Eugene Br. 38 (quoting H.R. Rep. No. 98-934, at 74 (1984)).

because the Act directs cable operators to pass-through their franchise fees to cable subscribers, 47 U.S.C. § 542(e), franchising authorities have an incentive to limit cable operators' costs to reduce the fees that subscribers ultimately pay.

Petitioners also assert that by “superimposing section 622’s fee cap” on the cost consideration in section 626, the *Order* “perversely imposes greater restrictions on the *cable-related* franchise requirements Congress authorized than on *non-cable-related* franchise requirements.” Eugene Br. 22 (emphasis in original); *id.* at 32. But Petitioners do not explain why restrictions on cable-related, in-kind contributions are greater simply because more statutory provisions apply to them. Further, the fact that non-cable-related, in-kind contributions are subject to section 622(b) but not also section 626 has no relevance to whether cable-related, in-kind contributions are included in the “franchise fee” definition in section 622(g)(1).

Nor is there merit to Petitioners’ argument that the franchise fee ruling in the *Order* violates section 622(i)’s prohibition on Commission regulation of “the use of funds derived from [franchise] fees except as provided in [section 622].” Eugene Br. 34, Portland Br. 35-37; 47 U.S.C. § 542(i). The *Order* simply clarifies the composition of a franchise fee—specifically, that it includes cable-related, in-kind contributions. Though Petitioners believe that

franchising authorities now must “pay” for cable-related franchise requirements “through franchise fee offsets,” that is a consequence of the statutory cap on franchise fees, not the Commission’s franchise fee rulings. Eugene Br. 34. After the *Order*, franchising authorities have substantial discretion to collect the franchise fee amount determined by section 622(b) as money, to allocate that amount to cable-related, in-kind franchise requirements, or to use some combination of the two.

2. There Is No Conflict Between The Commission’s Interpretation Of “Franchise Fee” And Other Provisions In The Act.

To support their argument that cable-related, in-kind contributions are not franchise fees, Petitioners rely on two provisions in the Act (sections 622(c) and 623) that distinguish franchise fees from assessments for public, educational and governmental channels. Eugene Br. 35-37. Neither, however, advances Petitioners’ argument.

Section 622(c) provides that cable operators may identify “as a separate line item on each regular bill of each subscriber”: “(1) the amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid,” and “(2) “[t]he amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels

or the use of such channels.” 47 U.S.C. § 542(c). As the Commission explained at the time of the provision’s enactment, “[s]ection 622(c) has to do with increasing political accountability for regulatory costs imposed, by permitting subscribers to be informed that a portion of their bills are related to governmentally imposed obligations.” *Implementation of The Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation*, 8 FCC Rcd 5631, 5697 (¶ 545) (1993). By separately listing franchise fees and PEG requirements in section 622(c), Congress sought to inform subscribers about the nature of the charges on their cable bills. *Order* ¶ 22 (JA ____). Indeed, as Petitioners’ attest, PEG channels further the statutory purposes of “assur[ing] that cable systems are responsive to the needs and interests of the local community” and “that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.” Eugene Br. 7, 29; 47 U.S.C. § 521(2), (4). Congress’s decision to highlight PEG requirements only means that Congress wanted cable subscribers to know what portion of their bill is attributable to them; that in no way suggests that PEG requirements never count as franchise fees. *Order* ¶ 22 (JA ____).

Further, as the Commission pointed out, the franchise fee and PEG categories in section 622(c) are not mutually exclusive. *Id.* ¶ 30 (JA ____).

Section 622(g)(2)(C) of the Act excepts PEG capital costs from the definition of “franchise fee.” 47 U.S.C. § 542(g)(2)(C). Because those costs are not “franchise fees,” Congress accounted for them by including a separate category for the cost of PEG requirements.

Petitioners also invoke section 623 of the Act, which separately lists “franchise fee[s]” and “franchise requirements to support public, educational, or governmental channels or the use of such channels” as two factors (among five) that the Commission must account for in prescribing cable rates. 47 U.S.C. § 543(b)(2)(C)(v)-(vi); Eugene Br. 35-36. But rate-setting is “legally and analytically distinct” from franchising. Thus, there is no reason to infer that distinguishing between franchise fees and PEG charges for purposes of prescribing cable rates should carry over to limit the broad definition of “franchise fee.” *Order* ¶ 30 (JA____).³

Moreover, as is the case with section 622(c), the franchise fee and PEG categories in section 623(b)(2)(C) are not mutually exclusive. Because PEG capital costs are not “franchise fees,” they fall outside the scope of section 623(b)(2)(v). Without section 623(b)(2)(vi), which covers the cost of PEG

³ The Commission regulations relating to “cable rates and accounting” cited in Petitioners’ brief are inapposite and pertain to matters outside of the franchising process. *See* Eugene Br. 36-37.

requirements generally, there would be no way to account for PEG capital costs in establishing cable rates. *Order* ¶ 30 (JA____). Petitioners contend that if that were the case, Congress could have created a separate category for those costs. Eugene Br. 36. But there was no reason to do so, because section 623(b)(2)(C)(vi) already instructs the Commission to consider them.

B. The Commission’s Interpretation Of “Franchise Fee” Is Not Inconsistent With Build-Out And Customer Service Provisions In The Act.

Petitioners claim that the Commission’s determinations that build-out obligations and customer service standards are not franchise fees is inconsistent with its conclusion that franchise fees encompass most other cable-related, in-kind contributions. Eugene Br. 35-37; Portland Br. 22-26. Petitioners are mistaken.

1. Build-Out Obligations

In the *Order*, the Commission explained that a cable franchise reflects a “fundamental bargain” between franchising authority and cable operator, *Order* ¶ 57 (JA____): The franchising authority grants the cable operator access to public rights-of-way, and in return, the cable operator assumes the cost to construct and operate the authorized cable system. That bargain is reflected in section 621(a)(2)(B) of the Act, 47 U.S.C. § 541(a)(2)(B), which provides that “[a]ny franchise shall be construed to authorize the construction

of a cable system over public rights-of-way, and through easements, ... except that in using such easements the cable operator shall ensure ... that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both.” In light of that statutory directive, the Commission concluded that build-out obligations in cable franchises do not qualify as franchise fees. *Order* ¶ 57 (JA___).

Petitioners argue that this conclusion is unreasonable, but that argument lacks merit.

Petitioners first contend that section 621(a)(2)(B) only applies to private easements, not public rights-of-way. Eugene Br. 39, Portland Br. 24. That argument is not properly before the Court because it was not raised before the Commission. *Cellnet*, 149 F.3d at 442-443; 47 U.S.C. § 405(a).

Were the Court to reach the argument, it should reject it. “A right-of-way is a type of easement.” *See, e.g., U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1844 (2020). Thus, “such easements” in section 621(a)(2) encompass rights-of-way. That makes sense. A cable operator might request access to easements along streets and roads (rights-of-way), but it also might request access to other types of easements set aside for public

use.⁴ If the specifications in sections 621(a)(2)(A)-(C) did not also apply to rights-of-way, the statute would improbably afford greater protection to non-rights-of-way easements than rights-of-way. That would be absurd; the statute is more sensibly read to apply to all rights-of-way and easements.

Next, Petitioners argue that if section 621(a)(2)(B) excepts build-out obligations from the statutory definition of “franchise fee,” then it likewise must exclude I-Nets. According to Petitioners, an I-Net is part of a “cable system” located in an easement; thus, they contend, the costs of its construction and operation should not count against the franchise fee cap. Portland Br. 22-23.

That claim also is not before the Court, because Petitioners failed to give the Commission the requisite opportunity to pass on it. 47 U.S.C. § 405(a); *Cellnet*, 149 F.3d at 442-443. Before the agency, Petitioners raised a different argument—that the Commission should not “distinguish[] between build-out obligations and other cable-related contributions such as PEG and I-

⁴ Petitioners’ argument that “easements” in section 621(a)(2)(B) are only “private easements” fails for another reason: Courts have consistently held that section 621(a)(2)(B) applies to public use easements. *See, e.g., Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners*, 737 F. Supp. 903, 909-911 (E.D. Va. 1990), *aff’d*, 991 F.2d 1169 (4th Cir. 1993); *Cable Associates, Inc. v. Town & Country Mgmt. Corp.*, 709 F. Supp. 582, 584-586 (E.D. Pa. 1989).

Net support based on which entities receive the benefit of such obligations or whether such obligations can be considered ‘essential’ to the provision of cable services.” *Order* n.230 (JA___).⁵ In the *Order*, the Commission explained that it “d[id] not need to address [that] argument” because it had “clarified” that its exclusion of build-out obligations was based on section 621(a)(2)(B)’s directive that build-out costs are the responsibility of the cable operator. *Id.* Petitioners cannot raise a different argument in this Court for the first time. *See Verizon Tel. Cos. v. FCC*, 292 F.3d 903, 910-911 (D.C. Cir. 2002).

Regardless, Petitioners’ arguments are unavailing. Section 621(a)(2)(A) specifies that a cable operator, as part of its franchise obligation, “shall ensure ... that the safety, functioning, and appearance of property and the convenience and safety of other persons not be adversely affected by

⁵ Portland complains that it lacked notice of the Commission’s rationale for concluding that build-out obligations are not subject to the statutory cap on franchise fees. Portland Br. 25-26. The APA requires an agency to publish “either the terms or substance of the proposed rule or a description of the subjects and issues involved.” 5 U.S.C. § 553(b)(3). In the *Second NPRM*, the Commission stated that it “d[id] not think [that build-out obligations] should be considered contributions to [a franchising authority].” *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, 33 FCC Rcd 8952 (¶ 21) (JA___) (“*Second NPRM*”). That statement provided parties with adequate notice that the Commission did not believe that build-out obligations count against the franchise fee cap.

installation or construction of facilities necessary for a cable system.” 47

U.S.C. § 541(a)(2)(A). The “cost” of “such facilities” in section 621(a)(2)(B) refers to the “facilities necessary for a cable system” in the preceding subsection. Section 611(b), in turn, provides that a franchising authority “*may* require” that “channel capacity on institutional networks be designated for educational or governmental use.” 47 U.S.C. § 531(b) (emphasis added).

Thus, a franchising authority is permitted, but not obligated, to include I-Nets obligations in cable franchises. *See Jama v. Immigration and Customs Enf’t*, 543 U.S. 335, 346 (2005) (“The word ‘may’ customarily connotes discretion.”). For that reason, I-Net facilities are not “facilities necessary for a cable system.” 47 U.S.C. § 541(a)(2)(A); *cf. Order* ¶ 20 (JA ____).⁶

2. Customer Service Standards

Petitioners also argue that the *Order* “fails to provide a rational basis for distinguishing” customer service standards, which they contend are “no different from the ... other cable-related services the Cable Act permits

⁶ Contrary to Portland’s assertion, the Commission did not hold that the “maintenance of the part of the cable system used ... for carriage of PEG signals to subscribers count[s] against the [franchise] fee.” Portland Br. 33 (citing *Order* ¶ 42 (JA ____)). Instead, the Commission *declined* to decide whether those costs fall within the exception for PEG capital costs in section 622(g)(2)(C), 47 U.S.C. § 542(g)(2)(C), and held that pending a decision on this issue, channel capacity costs should not count against the franchise fee cap. *Order* ¶¶ 42, 44 (JA ____, ____).

[franchising authorities] to include as franchise requirements.” Eugene Br. 40; *see* 47 U.S.C. § 552(a) (authorizing franchising authorities to establish and enforce “customer service requirements of the cable operator”). But the Commission reasonably explained that unlike non-monetary contributions that count as “franchise fees” (*e.g.*, free cable service to government buildings), customer service requirements are not a “tax, fee or assessment”; rather, they “are regulatory standards that govern how cable operators are available to and communicate with customers.” *Order* ¶ 58 (JA____). *See* H.R. Rep. No. 98-934, at 79 (“In general, customer service means the direct business relation between a cable operator and a subscriber.”).⁷

Separately, Petitioners complain that the Commission should have “exempt[ed] other obligations that the Cable Act says may be imposed,” Portland Br. 27 (citing 47 U.S.C. §§ 543(e), 551, 552, 554(i)), and “consider[ed] whether other obligations the Commission classifies as ‘fees’ (like discounts to schools)” count as franchise fees. *Id.* But an agency need not develop legislative rules to “address every conceivable question.” *Shalala*

⁷ “[C]ustomer service requirements include requirements related to interruption of service; disconnection; rebates and credits to consumers; deadlines to respond to consumer requests or complaints; the location of the cable operator’s consumer service offices; and the provision to customers (or potential customers) of information on billing or services.” *Id.*

v. Guernsey Mem'l Hosp., 514 U.S. 87, 96 (1995). If Petitioners (or any other franchising authorities) desire clarification of the scope of the rules adopted in the *Order*, they can request a declaratory ruling from the Commission. *See* 47 C.F.R. § 1.2 (the Commission “on motion or on its own motion may issue a declaratory ruling terminating a controversy or removing uncertainty”).

C. There Is No Merit To Petitioners’ Claims That The *Order’s* Franchise Fee Rulings Are Arbitrary And Capricious.

Petitioners and their Supporting Intervenors raise various additional arguments about why the franchise fee rulings in the *Order* are arbitrary and capricious. Each lacks merit.

1. The Commission’s Franchise Fee Position Has Not Changed, And In Any Event It Was Reasonably Explained In The *Order*.

Petitioners and their Supporting Intervenors contend that in adopting the franchise fee rulings in the *Order*, the Commission changed positions without explanation. Portland Br. 21 n.4; Int. Br. 28-30. Not so.

To begin with, the Commission did not change its position. Prior to 2006, the Commission had not taken a position on what constitutes a franchise fee. When it addressed that issue in the *First Report and Order*, it determined that non-monetary contributions can be “franchise fees”—a decision that this Court upheld in *Alliance for Community Media*, 529 F.3d at

782-783. Shortly thereafter, the Commission released the *Second Report and Order*, which held that a “franchise fee” can encompass cable-related, non-monetary contributions. Although this Court in *Montgomery County* held that the Commission had not explained why cable-related, in-kind contributions are franchise fees, it provided the Commission an opportunity to explain the basis for that determination, and the Commission did so in the *Order* on review. *Montgomery County*, 863 F.3d at 490-492.

Accordingly, this case is unlike *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2123 (2016), where the Department of Labor, without explanation, changed a longstanding regulation to make certain car dealership employees eligible for overtime pay. *See* Int. Br. 30-31. Although franchise authorities may have been collecting franchise fees and requiring cable-related franchise terms for decades, these practices occurred in the absence of a Commission interpretation. Consequently, there was no change in position for the Commission to explain in the *Order*. Indeed, since the *Second Report and Order* in 2007, the Commission’s position has been that cable-related, in-kind contributions are franchise fees. *Order* ¶ 63 (JA____).

In any event, the *Order* amply explains why the language, structure, and legislative history support the Commission’s interpretation of the Act. *See Order* ¶¶ 14-22 (JA____ - ____). Thus, even if the Commission had changed

its position, the *Order* “provide[s] a reasoned explanation for the change,” and nothing more is required. *Encino Motorcars*, 136 S. Ct. at 2125.

2. The *Order* Does Not Undermine Any Reasonable Franchising Authority Reliance Interests.

Petitioners relatedly contend that the Commission did not account for franchising authorities’ reliance on cable-related, in-kind contributions—notably, support for PEG and I-Nets—that they believed were excluded from the statutory definition of “franchise fee.” Portland Br. 21 n.4; Int. Br. 28-36. But franchising authorities have been on notice since 2007 that the Commission interprets “franchise fee” to include non-monetary contributions, whether cable-related or not. Thus, they have had ample time to amend the terms in their franchise agreements, negotiate new franchise agreements, and adjust their budgets as needed to accommodate that interpretation.

Reasonable reliance does not encompass persisting in practices that a petitioner should know do not comport with the statute. *See Westar Energy, Inc. v. FERC*, 568 F.3d 985, 989 (D.C. Cir. 2009) (agency did not upset petitioner’s expectations when it imposed refunds that petitioner knew it might require); *Order* ¶ 63 (JA____). Even disruption to a settled understanding is “not a license ... to disregard the law.” *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2481 (2020).

3. The *Order* Does Not Threaten Public Safety.

Petitioners and their Supporting Intervenors argue that as a result of the *Order*, local governments will lose their I-Nets and PEG channels, which are used for public safety purposes. Portland Br. 21, n.4; Int. Br. 28-36. That argument is unpersuasive.

First, it ignores the *Order*'s expansion of the exception for PEG capital costs to include both the cost to construct PEG access facilities and "the acquisition of equipment needed to produce PEG access programming," *Order* ¶ 35 (JA____), such as "a van or a camera," *id.* ¶ 39 (JA____). That ruling will increase the amount of PEG-related costs that a cable operator must absorb, separate from the five percent franchise fee. It also makes more of the franchise fee available to offset the cost of other franchise requirements, like I-Nets. *Id.* ¶ 53 (JA____).

Second, the fact that I-Net and PEG access requirements are subject to the franchise fee cap does not deprive franchising authorities of their ability to impose such requirements in franchise agreements; it just means that cable operators only have to bear the cost of those requirements up to the amount of the franchise fee cap. Franchising authorities can take the franchise fee as

money, or apply it to I-Net and PEG requirements, or do a combination of both. *Id.* ¶ 54 (JA___); *see id.* ¶ 63 (JA ___).⁸

In any event, the Commission had a duty to implement the franchise fee cap’s application to “any tax, fee, or assessment of any kind” imposed by a franchising authority on a cable operator. 47 U.S.C. § 542(g)(1); *Order* ¶ 53 (JA___). Although I-Nets may “provide benefits to communities,” including “public safety” benefits, *Order* n.221 (JA___), “such benefits cannot override the statutory framework.” *Id.* ¶ 55 (JA___).

4. Fair Market Value Is A Reasonable Measure Of The Value Of Cable-Related, In-Kind Contributions.

Petitioners and Supporting Intervenors assert that the Commission did not justify its decision to use fair market value to set the rate for cable-related, in-kind contributions. Eugene Br. 41-42; Int. Br. 40-46. But the Commission’s decision was reasonably based on two considerations. First, fair market value is “easy to ascertain,” because cable operators often have

⁸ Petitioners’ Supporting Intervenors also argue that the *Order* will upend the process of negotiating cable franchises, “because it makes little sense to negotiate if every concession by an operator will be deemed an ‘exaction’ akin to unilaterally imposing a fee.” Int. Br. 41. In fact, franchising authorities have substantial bargaining power due to their control of the rights-of-way. That is why Congress capped franchise fees at five percent of annual cable revenues in the first place. *Order* ¶¶ 61, n.244, 93 (JA___, ___); 47 U.S.C. § 542(b).

“rate cards” for the services they offer to retail customers. *Order* ¶ 61 (JA____). Second, fair market value represents the rate that a franchising authority would pay for a facility or service if it could not require it as a franchise term. *Id.*

Nor will franchising authorities have to pay “whatever is demanded by an existing provider” for their I-Nets. Int. Br. 42. I-Net facilities are comparable to business data services offered by cable operators and non-cable providers. *Order* n.241 (JA____). Thus, if a franchising authority believes that the fair market value proposed by the cable operator is unreasonable, it can purchase elsewhere the facilities or services needed for its I-Net. *Id.* n.242 (JA____). The fact that local governments’ services may be “tailored to the specific needs of their communities and integrated with other systems” does not mean that the services the cable operator provides lack useful comparisons. Int. Br. 42. Franchising authorities and cable operators are free to use the fair market value of the most similar retail service as a baseline, and negotiate an amount that reflects any unique aspects of localities’ existing services. Indeed, the Commission expected that cable operators and franchising authorities would negotiate amendments to their franchise agreements to reflect the *Order*’s franchise fee rulings. *Order* ¶ 62 (JA____).

Petitioners and their Supporting Intervenors further contend that the value of cable-related, in-kind contributions should be determined by the cost to the cable operator of providing such contributions. Eugene Br. 42; Int. Br. 44-45. But nothing in the Act mandates a cost-based assessment. Section 622(a) states that “any cable operator may be required under the terms of any franchise to pay a franchise fee,” without further prescribing how that fee will be calculated. 47 U.S.C. § 542(a). Although sections 622(c) and 623 of the Act account for cable operators’ costs in itemizing bills and setting rates, that does not require that the value of in-kind contributions be determined using the same measure. Int. Br. 44-45. As the Commission explained, sections 622(c) and 623 are analytically distinct from section 622(g). *See Order* ¶¶ 22, 30 (JA____, ____).

Instead, the Commission reasonably determined that using fair market value is superior to using actual cost, because it avoids shifting the “true cost” of an in-kind contribution from taxpayers at large to-cable subscribing taxpayers, and it best “adheres to Congressional intent” to “limit the amount that [franchising authorities] may exact from cable operators.” *Id.* ¶ 61 (JA____).

5. The Act Only Requires Cable Operators To Provide Adequate PEG Access.

In the *Order*, the Commission held that PEG transport (*i.e.*, dedicated lines that transmit PEG programming from the studio to the cable system) are PEG capital costs that do not count against the franchise fees cap. *Order* ¶ 49 (JA___); 47 U.S.C. § 542(g)(2)(C). Under section 621(a)(4)(B) of the Act, a franchising authority, “in awarding a franchise,” may require “adequate public, educational, and governmental access channel capacity, facilities, or financial support.” 47 U.S.C. § 541(a)(4)(B). However, the Commission also clarified that franchising authority requests for PEG transport lines that a cable operator deems more than “adequate” can be challenged in court. *Order* ¶ 49 (JA___); *see* 47 U.S.C. § 555.

Petitioners contend that the latter ruling “impermissibly changed the renewal standard” contained in section 626 of the Act, which is based on whether a cable operator’s renewal proposal is “reasonable” to meet the future needs and interests of the community. Portland Br. 61-63; 47 U.S.C. § 546(c)(1)(D). Their view would mean that the specific limits on franchising authorities’ discretion in section 621(a)(4)(B)—notably, that a franchising authority can demand only “adequate” PEG channel capacity—apply to initial franchises but not franchise renewals, thereby unreasonably enabling

franchising authorities to avoid the restrictions in section 621(a) in the franchise renewal process. *Order* n.193 (JA____); *Stay Denial Order* ¶ 12.

Nor is Petitioners' reading compelled by the canon of statutory construction that specific provisions generally control over general ones. Portland Br. 62-63. Section 621's adequacy standard is the more specific, as it applies only to PEG access; section 626's "reasonable" standard applies to franchise renewals generally. There is thus no basis for concluding that section 626 permits a franchising authority to require more than adequate PEG access channels, facilities, or financial support when a franchise is being renewed.

II. THE COMMISSION REASONABLY APPLIED THE MIXED-USE RULE TO ALL INCUMBENT CABLE OPERATORS.

The Commission in the *Order* held that its mixed-use rule applies to incumbent cable operators, whether or not they also operate as common carriers. *Order* ¶¶ 64-79 (JA____ - ____). Thus, franchising authorities may not regulate non-cable services (*e.g.*, broadband Internet access services) offered over incumbent cable operators' cable systems, except as expressly permitted by the Act. *Id.* ¶ 64 (JA____); 47 C.F.R. § 76.43. That conclusion accomplished Congress's stated intent to limit franchising authorities'

jurisdiction to cable services, as set forth in the statutory text and the legislative history. *Cf. Alliance for Community Media*, 529 F.3d at 786.

A. The Commission’s Renewed Application Of The Mixed-Use Rule To Cable Operators That Are Common Carriers Is Lawful.

The Commission affirmed its conclusion—which this Court did not disturb in *Montgomery County*—that the mixed-use rule applies to incumbent cable operators that are common carriers. *Order* ¶¶ 64-71 (JA ____ - ____); *Montgomery County*, 863 F.3d at 493. As before, the Commission relied on section 602(7)(C) of the Act, 47 U.S.C. § 522(7)(C), which excludes from the term “cable system” “a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of [the Act].” *Order* ¶¶ 68-70 (JA ____ - ____). Under section 3(51) of the Act, a “telecommunications carrier,” that is, a “provider of telecommunications services,” “shall be treated as a common carrier ... only to the extent that it is engaged in providing telecommunications services.” 47 U.S.C. § 153(51). Accordingly, an incumbent cable operator that offers telecommunications service can be regulated by a franchising authority only to the extent it provides cable service. *Order* ¶ 68, n.262 (JA ____).

Petitioners contend that because section 602(7)(C) further specifies that “a facility of a common carrier” is part of a “cable system” “to the extent

such facility is used in the transmission of video programming directly to subscribers,” Portland Br. 50, “no portion of a traditional system ... would be exempt.” *Id.* But the fact that a “facility of a common carrier” is part of a cable system when “used in the transmission of video programming” does not mean that a facility that is “used in the transmission of video programming” can *never* be a “facility of a common carrier.” The Commission reasonably concluded that “a facility should be categorized as a ‘facility of a common carrier’ [exempt] under section 602(7)(C) so long as it is being used to provide some type of telecommunications service.” *Order* ¶ 70 (JA____).

Likewise, the Act’s specification that a service can be a “telecommunications service” “regardless of the facilities used,” 47 U.S.C. § 153(53), supports the Commission’s reading. *See* Portland Br. 51. If “a facility of a common carrier” is defined as a facility used to provide a common carrier service, it necessarily follows that a cable operator’s facility is the “facility of a common carrier”—and not within the regulatory purview

of a franchising authority—when it provides a “common carrier” service.⁹ It is well-established that common carriage designation is based on the service provided, not the nature of the facilities, *Nat’l Ass’n of Regulatory Util. Cmm’rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976), and when an entity provides common carrier and non-common carrier services, it is subject to a bifurcated regulatory regime like the one Congress established in section 602(7)(C). *Cellco P’ship v. FCC*, 700 F.3d 534, 538 (D.C. Cir. 2012).

To be sure, in enacting the Cable Act, Congress was aware “that cable systems were mixed-use systems providing cable and non-cable services.” Portland Br. 50. But that fact does not compel the conclusion that Congress intended for franchising authorities to regulate non-cable services under Title VI. To the contrary, the legislative history is “replete with statements reflecting” Congress’s intent to “preserve the then-*status quo* regarding the ability of federal, state, and local authorities to regulate non-cable services provided via cable systems.” *Order* ¶ 71 (JA____) (citing H.R. Rep. No. 98-

⁹ Petitioners’ reliance on *FTC v. AT&T Mobility, Inc.*, 883 F.3d 848, 858 (9th Cir. 2018) (en banc), which rejected a “status-based” interpretation of the common carrier exemption in the Federal Trade Commission Act, is misplaced. That a franchising authority cannot regulate the common carrier services of a cable operator has no effect on the franchising authority’s continuing ability to regulate a cable operator’s cable services, consistent with Title VI.

934, at 41). Historically, regulation of telecommunications services was divided between the Commission (for interstate services) and the states (for intrastate services). *Id.* Petitioners’ interpretation of section 602(7)(C) would eliminate this division and bestow on franchising authorities power over interstate telecommunications that they have never had.

Finally, the Commission’s affirmance of the mixed-use rule is not inconsistent with its decision to preempt state and local regulation of non-cable services. Portland Br. 52. Even if section 602(7)(C) excludes “a facility of a common carrier” from the “cable system” that a franchising authority can regulate under Title VI, those facilities are still part of the “cable system” authorized by a Title VI “cable franchise.” *See Order* ¶¶ 86-88 (JA ____ - ____); Part III, *infra*.

B. The Commission Identified A Valid Statutory Basis For Application Of The Mixed-Use Rule To Incumbent Cable Operators That Are Not Common Carriers.

The Commission also reasonably extended the mixed-use rule to cable operators that are not common carriers because they provide non-cable, non-telecommunications services (*e.g.*, information services) in addition to cable service.

The Commission relied on section 624(a) of the Act, 47 U.S.C. § 544(a) (“A franchising authority may not regulate the services, facilities,

and equipment provided by a cable operator except to the extent consistent with [Title VI]”), and on section 624(b)(1), 47 U.S.C. § 544(b)(1) (“A franchising authority ... may not ... establish requirements for video programming or other information services.”). *Order* ¶¶ 72-79 (JA___ - ___). (Although Section 624 does not define “information services,” the legislative history distinguishes them from “cable services.” *Id.* ¶ 73 (JA___)). The Commission concluded that those statutory provisions, read together, bar franchising authorities from regulating under Title VI of the Act the non-cable services, facilities, and equipment of cable operators.

Petitioners contend that the Commission’s reading of section 624(b)(1) cannot displace franchising authorities’ ability under section 624(b)(2)(B) to “enforce provisions for broad categories of video programming or other services.” Portland Br. 57; 47 U.S.C. § 544(b)(2)(B). But the statute was intended to ensure franchising authorities had the power to enforce “commitments made in arms-length transactions” that they otherwise have the authority to impose. *Order* ¶ 75 (JA___). Because section 624(b)(1) bars franchising authorities from regulating information services, they cannot rely on section 624(b)(2)(B) to require franchise commitments related to such services. *See id.*

Likewise, the general power of a franchising authority to “establish requirements for facilities and equipment” in section 624(b)(2)(A), 47 U.S.C. § 544(b)(2)(A), does not extend beyond cable services. *Id.* ¶ 77 (JA___). To be sure, the Act in specific circumstances permits franchising authorities to impose requirements on cable operators that are not strictly related to the provision of cable service. Portland Br. 47 (citing 47 U.S.C. § 553(c)(3)(D)). But to the extent they apply to non-cable services, they are specific exceptions to section 624’s prohibition. *Order* ¶ 77 (JA___).¹⁰

III. THE COMMISSION LAWFULLY PREEMPTED CONFLICTING STATE AND LOCAL REGULATIONS.

Section 636(c) of the Act broadly preempts “any provision of law of any State, political subdivision, or agency thereof” that is “inconsistent with this chapter.” 47 U.S.C. § 556(c). In the *Order*, the Commission relied on section 636(c) to preempt: (1) fees imposed on a cable operator that exceed the statutory cap on franchise fees in section 622(b) of the Act; and (2) any

¹⁰ Petitioners also assert that the Commission’s mixed-use rule is unlawful because it “incorrectly limits” franchising authorities’ ability to require construction of I-Nets under section 621(b)(3)(D) of the Act. 47 U.S.C. § 541(b)(3)(D); Portland Br. 54-55; 47 C.F.R. § 76.43. That argument is not before the Court because Petitioners failed to raise it before the Commission. 47 U.S.C. § 405(a); *Cellnet*, 149 F.3d at 442-443. Moreover, the Commission in the *Order* took no position on whether the mixed-use rule applies in this manner.

requirement that a cable operator with a Title VI franchise secure another franchise to provide non-cable services. *Order* ¶ 80 (JA___).¹¹ This preemption was lawful. The Commission has “exclusive jurisdiction over cable service, and overall facilities which relate to such service.” *City of New York v. FCC*, 814 F.2d 720, 723 (D.C. Cir. 1987). Allowing states and localities to regulate cable operators’ facilities and services using purported authority outside Title VI, as interpreted by the Commission, is therefore inconsistent with the Act.

A. The Commission Reasonably Determined That State And Local Regulation Of Cable Operators’ Non-Cable Services Is Inconsistent With The Act.

Petitioners assert that the *Order* “fail[ed] to identify any conflict with federal law” that would justify preemption of non-cable regulations imposed by states and localities under non-Title VI sources of authority. Eugene Br. 48. More specifically, they argue that cable franchises granted under section 621(a) of the Act are not “the exclusive means for state and local

¹¹ Petitioners seem to contend that because section 636(c) preempts state and local authority “which is inconsistent with this chapter,” the Commission must identify a conflict with a statutory provision outside Title VI to justify preemption. Portland Br. 44-45. If that is their argument, it makes no sense. “[T]his chapter” refers to the Act. Title VI is a subchapter of the Act. Thus, a conflict between a state law and a provision in Title VI is a conflict between a state law and “this chapter” and is therefore subject to preemption under section 636(c).

governments to regulate a cable operator’s non-cable-related activities.”

Eugene Br. 48; 47 U.S.C. § 541(a). That argument, however, is contradicted by the text, structure, and legislative history of Act.

Section 621(a)(1) of the Act provides franchising authorities the right to grant franchises that are “construed to authorize the construction of a cable system over public rights of way.” 47 U.S.C. § 541(a)(2). The “cable system” covered by the franchise can provide more than cable services, as the Act and the legislative history recognize. *See, e.g.*, 47 U.S.C. § 541(b)(2); *Order* ¶¶ 86-94 (JA___ - ___).¹²

Yet, instead of giving states and localities broad authority to impose fees and other requirements on cable operators’ provision of non-cable services over their franchised cable systems, the Act “sharply circumscribes” their authority to require or regulate non-cable services as part of the franchise. *Order* ¶ 88 (JA___). For example, section 621(b)(3)(D) of the Act, 47 U.S.C. § 541(b)(3)(D), provides that “a franchising authority may not

¹² H.R. Rep. No. 98-934 at 44 (“The term ‘cable system’ is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable service (including video programming) along with communications services other than cable.”).

require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.” Likewise, section 624(b)(2), 47 U.S.C. § 544(b)(1), states that “a franchising authority may not ... establish requirements for video programming or other information services.” In light of these provisions, it would be wholly inconsistent with the Act if local franchising authorities were permitted to require a cable operator to obtain two franchises (one for cable service and one for non-cable services), or to pay two fees. Eugene Br. 48. As the Commission explained, “Congress intended that states and localities” be prohibited from performing an “‘end-run’ [around] the Act’s limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly.” *Order* ¶ 81 (JA___); *see id.* ¶ 100 (JA___).

Petitioners contend that sections 621 and 624 of the Act only prohibit a franchising authority from requiring a cable operator to provide non-cable services in return for a franchise, and that if the franchised cable operator chooses to provide them, then a franchising authority can regulate them under non-Title VI sources of authority. Eugene Br. 48-49; Portland Br. 46-47. That distinction makes no sense. If states and localities could bypass sections

621(b)(3)(D) and 624(b)(2) by waiting for a cable operator to provide telecommunications and information services—which its Title VI cable franchise authorizes—then the restrictions in those provisions would have no effect. *Cf. Order* ¶ 74 n.286 (JA____).

Relying on *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), Petitioners also assert that, in enacting Title VI, Congress did not displace states’ and localities’ independent authority to regulate rights-of-way. Eugene Br. 49-55, Portland Br. 48. But *City of Dallas* is inapposite. There, the Fifth Circuit vacated the Commission’s decision to preempt state and local franchising of open video system providers. The Commission based its decision on those providers’ statutory exemption from the franchise requirement in section 621(a). *See City of Dallas*, 165 F.3d at 347. The Fifth Circuit held that outside the bounds of Title VI, states and localities can impose franchise requirements under their pre-existing authority over public rights-of-way. *Id.* Here, however, cable franchises granted under section 621(a) authorize rights-of-way access for cable systems that can be used to provide non-cable services. Such services are plainly within the bounds of Title VI, *Order* ¶¶ 86-88 (JA____ - ____), and thus, the regulation of cable operators’ non-cable services by state and local governments cannot exceed Title VI’s limits. *Id.* ¶ 80 (JA____, ____).

Nor does section 621(d)(2) of the Act, 47 U.S.C. § 541(d)(2), support Petitioners’ assertion of non-Title VI authority over non-cable services.

Portland Br. 48. Section 621(d)(2) provides that “[n]othing in [Title VI] shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.” 47 U.S.C. § 541(d)(2). As the Commission explained, “this provision is not an affirmative grant to states of authority to regulate non-cable services that they historically have not been empowered to regulate.” *Order* ¶ 95 (JA ____). When Congress enacted the Cable Act of 1984 (which included section 621(d)(2)), “information services” were deemed jurisdictionally interstate and thus were beyond the authority of state and local authorities. *Id.*

To be sure, section 636 of the Act includes a savings clause providing that “[n]othing in [Title VI] shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of [Title VI].” 47 U.S.C. § 556(a); Eugene Br. 47-48; Portland Br. 46. However, states and localities may not exercise that authority in a manner that conflicts with federal law. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) (“[W]hen federal

officials determine ... that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact ... such regulation.”). In any event, as the Commission stated, the *Order* leaves “meaningful room for states to exercise their traditional police powers under section 636(a).” *Order* ¶ 107 (JA____). States and localities can still engage in “rights-of-way management” (including “enforcement of building and electrical codes”) and “generally policing such matters as fraud, taxation and general commercial dealings,” so long as their actions are consistent with Title VI. *Id.*; *see id.* ¶ 79 (JA____).

B. The Commission Reasonably Preempted Duplicative Rights-Of-Way Fees And Franchise Requirements Imposed By States And Localities On Cable Operators’ Non-Cable Services.

As the courts have recognized, the Commission is charged with “the *ultimate* responsibility for ensuring a ‘national policy’ with respect to franchise fees.” *ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987). In the *Order*, the Commission made clear that franchising authorities are preempted from charging a cable operator a rights-of-way fee that is more than five percent of the cable operator’s gross revenues from cable services under Title VI or any other purported source of authority.

Petitioners contend that was unlawful because, in their view, “[g]enerally applicable right-of-way license fees” imposed on cable

operators’ non-cable services may not be preempted because they are not “franchise fees” under the Act. Eugene Br. 42 (quoting 47 U.S.C. § 542(g)(1)). That argument is based on the flawed premise that a cable operator’s Title VI cable franchise only covers the provision of cable services. However, as explained above, a cable franchise granted under section 621(a) authorizes access to the rights-of-way to construct and operate a cable system that can be used to provide both cable and non-cable services; in return, the cable operator pays the franchising authority a “franchise fee” that is capped at five percent of its revenues from cable services. 47 U.S.C. §§ 541(a), 542(b), (g); *Order* ¶¶ 86-88, 91-92 (JA ____ - ____, ____ - ____). A separate “right-of-way” fee imposed by a state or locality on a cable operator’s non-cable services would require the cable operator to pay a second time for the rights-of-way access already provided in its cable franchise—and thus would nullify the franchise fee cap. *Order* ¶ 90 (JA ____). For that reason, rights-of-way fees that are separate from franchise fees are inconsistent with the Act and preempted under section 636.

Petitioners therefore misunderstand the scope of a cable franchise when they argue that Eugene’s “seven percent right-of-way fee” is not a “franchise fee” under Title VI because it “applies only to telecommunications/broadband providers,” not cable operators when they are providing cable services.

Eugene Br. 42-45. Under the Act, a “cable operator” does more than provide “cable service”; it also “controls or is responsible for, through any arrangement, the management and operation of ... a cable system.” 47 U.S.C. § 522(5). And Congress understood that “cable operators” use their “cable systems” to provide non-cable services. *Order* ¶ 91 (JA___). Thus, a fee imposed on a cable operator’s non-cable services relates to the “management and operation” of its cable system, and by extension, it is imposed on the cable operator “solely because of its status” as a cable operator holding a Title VI cable franchise. *Id.* Accordingly, the “franchise fee” in section 622(g)(1) encompasses all of the fees levied on a cable operator for any authorized uses of a cable system.¹³

¹³ Petitioners observe that the Oregon Supreme Court rejected challenges to the City of Eugene’s rights-of-way fee in *City of Eugene v. Comcast*, 375 P.3d 446 (Or. 2016). Eugene Br. 9-11. However, that decision does not aid Petitioners, because it “fundamentally misreads the text, structure and legislative history of the Act.” *Order* ¶ 105 (JA___). Instead, the Commission agreed with the “majority of courts that have found a Title VI franchise authorizes a cable operator to provide non-cable services without additional franchises or fee payments to state or local authorities.” *Id.* & n.391 (JA___). Petitioners contend that those courts did not address the imposition of a uniform rights-of-way fee on all telecommunications and broadband providers outside the Title VI franchising process. Eugene Br. 44. That is a distinction without a difference. States and localities cannot regulate cable operators’ non-cable services, whether they purport to rely on their Title VI authority or on some other ground, and whether or not they regulate non-cable providers as well. *Order* ¶¶ 89-98 (JA___ - ___).

Petitioners’ interpretation of the phrase “solely because of” also conflicts with section 622(b) of the Act. *Order* ¶ 93 (JA___); 47 U.S.C. § 542(b). In 1996, Congress amended section 622(b), which until that year had capped a cable operator’s franchise fee based on the “revenues derived ... from the operation of the cable system.” 47 U.S.C. § 542(b). As amended, it caps cable operators’ franchise fees based on “revenues derived ... from the operation of a cable system *to provide cable services*.” *Id.* (emphasis added). If Congress had intended “cable operator” to refer to an entity only to the extent that it provides cable service, Eugene Br. 42-45, there would have been no reason for Congress to amend section 622(b) to impose that additional limitation. *Order* ¶¶ 93-94 (JA___ - ___).

As a fallback, Petitioners argue that “[e]ven if” fees like Eugene’s “could plausibly be characterized as being applied to a cable operator ‘solely because’ of its status as such,” that type of fee “also” falls within the franchise fee definition’s exception for

any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers).

Eugene Br. 45; 47 U.S.C. § 542(g)(2)(A). Neither the structure nor the language of section 622 supports their argument.

Section 622 creates “two mutually exclusive categories of assessments”—rights-of-way fees imposed on cable operators “solely because of their status” as cable operators (which are “franchise fees”) and “any tax, fee, or assessment of general applicability” (which are not “franchise fees”). *Order* ¶ 92 (JA___); 47 U.S.C. § 542(g)(1), (2)(A). If the phrase “solely because of their status as such” excludes rights-of-way fees imposed on cable operators and others from the “franchise fee” definition in section 622(g)(1), Congress would not have had to separately address generally applicable fees in section 622(g)(2)(A). *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) (holding that, where possible, every word in a statute should be given meaning).

Further, generally applicable fees are not excluded from the “franchise fee” definition if they are “unduly discriminatory against cable operators or cable subscribers.” 47 U.S.C. § 542(g)(2)(A). Though rights-of-way fees like Eugene’s may apply to all providers of non-cable services, they are “unduly discriminatory” when applied to cable operators because they are assessed on top of the five-percent franchise fee that cable providers already pay for their use of the public rights-of-way. *Order* ¶ 92 n.353 (JA___). Hence, cable operators and their subscribers pay two fees for rights-of-way access—one for cable service and one for non-cable services—whereas non-cable

providers (with whom cable operators often compete) only pay the non-cable fee for their use of the rights-of way.

Petitioners also assert that “[w]hile it may be unduly discriminatory” to impose a different rights-of-way fees on cable operators and providers of broadband services, “it is not at all discriminatory to impose the same broadband fee on all providers of broadband service,” which is “all Eugene’s ordinance does.” Eugene Br. 46. In fact, Eugene’s rights-of-way fee, when combined with the Title VI cable franchise fee, effectively imposes on cable operators a different (and far greater) fee than the fee imposed on non-cable telecommunications providers for exactly the same thing—access to the public rights-of-way.

C. Petitioners’ Remaining Preemption Challenges Are Unavailing.

1. The Legislative History Does Not Suggest That Congress Intended For Cable Operators To Pay Telecommunications Rights-of-Way Fees.

Petitioners argue that the legislative history of the Telecommunications Act of 1996 confirms that Congress intended to permit state and local governments to impose rights-of-way fees on cable operators’ telecommunications services. Eugene Br. 50-51 (discussing H.R. Rep. No. 104-458, at 180 (1996)). The language on which they rely mirrors section 253(c) of the Act, 47 U.S.C. § 253(c) (state and local governments may

require “fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for the use of public rights-of-way”). Portland Br. 59-60.

In fact, the statute and the legislative history support the Commission’s preemption decision. It is not “fair and reasonable” to charge a cable operator a second fee for rights-of-way access, when its Title VI franchise fee already pays for that access. Likewise, it is not “competitively neutral” to charge cable operators two rights-of-way fees, while non-cable operators pay one. For these reasons, “exempting” cable operators from “telecommunications and other non-cable rights-of-way fees” does not give them a “competitive advantage.” Eugene Br. 51. Rather, it places them on equal footing with their non-cable competitors.

Petitioners argue that unless cable operators pay a second rights-of-way fee for their non-cable services, they will effectively pay less for the use of rights-of-way than other providers of those services. That is because cable operators’ revenues from cable services (and, correspondingly, their franchise fees) are declining. *Id.* at 55. Ultimately, any such discrepancy exists because the Act caps a cable operator’s franchise fee at five percent of its cable revenues, 47 U.S.C. § 542(b); states and localities cannot bypass the statutory cap on policy grounds.

2. The Commission Reasonably Concluded That State And Local Regulation Of Cable Operators' Non-Cable Services Would Reduce Infrastructure Investment.

Petitioners also challenge the Commission's determination that "duplicative fees and franchise requirements" could slow cable operators' deployment of broadband infrastructure. *Order* ¶ 104 (JA____). According to Petitioners, cable operators have already become "the nation's largest broadband providers" while paying additional fees like those imposed by the City of Eugene. Eugene Br. 53. However, as the Commission noted, "even if cable operators were to continue to invest" in broadband infrastructure, "such investments likely would be higher" in the absence of extra fees. *Order* ¶ 104 (JA____). The record showed that "even small decreases in investment can have a substantial adverse impact on consumer welfare." *Id.* (citing Reply Comments of the National Cable and Telecommunications Association, App. 1, Report of Jonathan Orszag and Allan Shampine, at 16 (Orszag/Shampine Analysis) (filed Dec. 14, 2018) (JA____)). For example, an economic study submitted by NCTA showed that "[e]ven assuming" that cable operators paid taxes and fees equivalent to three percent of their telecommunications and broadband revenues, "and assuming that consumers bear half of those taxes and fees, the amount of taxes and fees borne by the cable operators would still be equal to approximately a quarter of expected infrastructure spending

on network improvements.” Orszag/Shampine Analysis at 18. Moreover, “[t]o the extent the taxes and fees are borne by consumers, that will harm consumers and decrease demand for such services and reduce incentives to invest.” *Id.* Although Petitioners now fault the Commission for failing to “analyze the impact” of those fees “in particular localities,” Eugene Br. 54, the Commission reasonably assumed that the analysis in the NCTA study applied nationwide.¹⁴

In any event, the Commission’s findings must be upheld if there is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Sasse v. U.S. Dep’t of Labor*, 409 F.3d 773, 778 (6th Cir. 2005) (internal quotations omitted). The Commission’s conclusion easily satisfies that “highly deferential” standard. *Id.*

3. The Commission Reasonably Explained Any Changed Position Regarding Additional Fees.

Petitioners wrongly assert that the Commission’s preemption ruling contradicts its statement in the *Second Report and Order* that the mixed-use

¹⁴ Eugene asserts that the Commission erred when it “tie[d] its public policy analysis” to sections 230(b) and 706 of the Act, because “neither provides authority to preempt.” Eugene Br. 52; 47 U.S.C. §§ 230(b), 1302. But the Commission’s preemption ruling relied on the express preemption provision in section 636(c) of the Act. *Order* ¶ 81 (JA___); 47 U.S.C. § 556(c). The public policy considerations simply support the Commission’s exercise of that authority.

rule “does not apply to non-cable fee requirements, such as any lawful fees related to the provision of telecommunications services.” Eugene Br. 56 (quoting *Second Report and Order* ¶ 11 n.31 and citing *Order* n.371 (JA___)). But the Commission in the *Second Report and Order* never said that charging a cable operator two rights-of-way fees is lawful. Having not changed its position, there was no need for the Commission to explain a change of course, and the Commission amply justified its determination in the *Order* that such fees are inconsistent with the Act and thus preempted.

4. The Commission’s Preemption Decision Is Constitutional.

Petitioners contend that the Commission’s preemption of certain state and local requirements commandeers state governmental power in violation of the Tenth Amendment to the U.S. Constitution. Portland Br. 40-41. But Congress provided that a franchising authority “may award” franchises “in accordance with [Title VI].” 47 U.S.C. § 541(a)(1). The Commission in the *Order* established federal standards with which franchising authorities must comply if they choose to open their rights-of-way to providers of interstate services within the Commission’s jurisdiction. Because those standards do not *require* franchising authorities to open their rights of way to interstate communications services, the *Order* does not violate the Tenth Amendment.

Order ¶ 110 (JA____). *Cf. Montgomery Cnty., Md. v. FCC*, 811 F.3d 121, 128-129 (4th Cir. 2015).

IV. THE COMMISSION REASONABLY APPLIED ITS FRANCHISING RULES AND DECISIONS TO STATE-LEVEL FRANCHISING ACTIONS.

Finally, the Commission reasonably applied its franchising rules and decisions to state-level franchising actions. *Cf. Portland Br.* 63-68. As the Commission explained, there is no statutory basis on which to distinguish state and local franchise requirements. Section 621(a) restricts the power of “franchising authorities,” which the Act defines as “any governmental entity empowered by Federal, State, or local law to grant a franchise.” And section 636(c) sweeps as broadly, expressly preempting “any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, that conflicts with the Act.” *Order* ¶¶ 113-114 (JA____ - ____); 47 U.S.C. §§ 522(10), 541(a)(1), 556(c).

Petitioners complain that the Commission lacked record support for its decision. *Portland Br.* 63-64. But the Commission’s interpretation turned on the statutory language. Lacking a “plausible interpretation” to the contrary, *Order* ¶ 114 (JA____), the Commission had no basis on which to reach a different conclusion. *Id.* ¶ 115 (JA____). In any event, evidence in the record

showed that state franchising actions were “impos[ing] burdens beyond what the Cable Act allows.”¹⁵ *See* Comments of the National Cable and Telecommunications Association, at 62-64 (filed Nov. 14, 2018) (describing millions of dollars of cable-related, in-kind franchise obligations—over and above the five percent franchise fee—required by state franchising authorities in Vermont, Texas, and Hawaii) (JA___ - ___); Reply Comments of Altice USA, Inc., at 5-6 (filed Dec. 14, 2018) (describing state franchising authorities’ imposition of rights-of-way fees that exceed the cap and reporting requirements on cable operators’ non-cable services) (JA___ - ___).

Nor will extending the Commission’s rulings to the states eliminate the benefits of state-level franchising. Portland Br. 65-66. The Commission’s franchising decisions only displace state law where they conflict with the Commission’s rules and decisions implementing the Act. *Order* ¶ 119 (JA___). Were the Commission to leave such conflicting laws in place, more states would have an incentive to enact laws that circumvent the Act’s restrictions on franchising authorities. *Id.* (JA___). Finally, the Commission reasonably explained that applying the Commission’s franchising decisions to

¹⁵ The Commission in the *First Report and Order* declined to address state-level franchising because many state franchising laws had only recently been enacted, and there was not a sufficient record regarding their effect. *Order* ¶ 111 (JA___) (citing *First Report and Order* n.2.).

state-level action ensures that the same rules apply at the state and local level, thus enabling consistent interpretation of the Act across jurisdictions. *Id.*

¶ 116 (JA ____).

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for review.

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I, Maureen K. Flood, hereby certify that on August 10, 2020, I filed the foregoing Brief for Respondents' with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the electronic CM/ECF system. The participants in the case, who are registered CM/ECF users will be served electronically by the CM/ECF system.

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Statutory & Regulatory Addendum

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5 U.S.C. § 553

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

- (1) a military or foreign affairs function of the United States; or
- (2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal

Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

- (1) a statement of the time, place, and nature of public rule making proceedings;
- (2) reference to the legal authority under which the rule is proposed; and
- (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

* * *

5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
 - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
 - (B) contrary to constitutional right, power, privilege, or immunity;
 - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
 - (D) without observance of procedure required by law;
 - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
 - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

47 U.S.C. § 153

For the purposes of this chapter, unless the context otherwise requires—

* * *

(51) Telecommunications carrier

The term “telecommunications carrier” means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

* * *

(53) Telecommunications service

The term “telecommunications service” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

* * *

47 U.S.C. § 230

Protection for private blocking and screening of offensive material

* * *

(b) Policy

It is the policy of the United States--

- (1) to promote the continued development of the Internet and other interactive computer services and other interactive media;
- (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;
- (3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;
- (4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and
- (5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

* * *

47 U.S.C. § 253

Removal of barriers to entry.

* * *

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

* * *

47 U.S.C. § 405

Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which

the Commission gives public notice of the order, decision, report, or action complained of.

47 U.S.C. § 521

Purposes

The purposes of this subchapter are to—

- (1) establish a national policy concerning cable communications;
- (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
- (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;
- (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
- (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter; and
- (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

47 U.S.C. § 522

Definitions

For purposes of this subchapter—

* * *

(5) the term “cable operator” means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

(6) the term “cable service” means—

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service;

(7) the term “cable system” means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any electric utility used solely for operating its electric utility system;

* * *

(10) the term “franchising authority” means any governmental entity empowered by Federal, State, or local law to grant a franchise;

47 U.S.C. § 531

Cable channels for public, educational, or governmental use

(a) Authority to establish requirements with respect to designation or use of channel capacity

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) Authority to require designation for public, educational, or governmental use

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

* * *

(f) “Institutional network” defined

For purposes of this section, the term “institutional network” means a communication network which is constructed or operated by the cable operator and which is generally available only to subscribers who are not residential subscribers.

47 U.S.C. § 541

General Franchise Requirements

- (a) Authority to award franchises; public rights-of-way and easements; equal access to service; time for provision of service; assurances
 - (1) A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise. Any applicant whose application for a second franchise has been denied by a final decision of the franchising authority may appeal such final decision pursuant to the provisions of section 555 of this title for failure to comply with this subsection.
 - (2) Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure—
 - (A) that the safety, functioning, and appearance of the property and the convenience and safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
 - (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
 - (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.
 - (3) In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.

(4) In awarding a franchise, the franchising authority—

- (A) shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area;
- (B) may require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support; and
- (C) may require adequate assurance that the cable operator has the financial, technical, or legal qualifications to provide cable service.

(b) No cable service without franchise; exception under prior law

(1) Except to the extent provided in paragraph (2) and subsection (f), a cable operator may not provide cable service without a franchise.

(2) Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

(3) (A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services—

- (i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services; and
- (ii) the provisions of this subchapter shall not apply to such cable operator or affiliate for the provision of telecommunications services.

(B) A franchising authority may not impose any requirement under this subchapter that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.

(C) A franchising authority may not order a cable operator or affiliate thereof--

- (i) to discontinue the provision of a telecommunications service, or
- (ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this subchapter with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 531 and 532 of this title, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

* * *

(d) Informational tariffs; regulation by States; “State” defined

- (1) A State or the Commission may require the filing of informational tariffs for any intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any State if offered by a common carrier subject, in whole or in part, to subchapter II of this chapter. Such informational tariffs shall specify the rates, terms, and conditions for the provision of such service, including whether it is made available to all subscribers generally, and shall take effect on the date specified therein.
- (2) Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis.
- (3) For purposes of this subsection, the term “State” has the meaning given it in section 153 of this title.

* * *

47 U.S.C. § 542

Franchise Fees

(a) Payment under terms of franchise

Subject to the limitation of subsection (b), any cable operator may be required under the terms of any franchise to pay a franchise fee.

(b) Amount of fees per annum

For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services. For purposes of this section, the 12-month period shall be the 12-month period applicable under the franchise for accounting purposes. Nothing in this subsection shall prohibit a franchising authority and a cable operator from agreeing that franchise fees which lawfully could be collected for any such 12-month period shall be paid on a prepaid or deferred basis; except that the sum of the fees paid during the term of the franchise may not exceed the amount, including the time value of money, which would have lawfully been collected if such fees had been paid per annum.

(c) Itemization of subscriber bills

Each cable operator may identify, consistent with the regulations prescribed by the Commission pursuant to section 543 of this title, as a separate line item on each regular bill of each subscriber, each of the following:

- (1) The amount of the total bill assessed as a franchise fee and the identity of the franchising authority to which the fee is paid.
- (2) The amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels.
- (3) The amount of any other fee, tax, assessment, or charge of any kind imposed by any governmental authority on the transaction between the operator and the subscriber.

(d) Court actions; reflection of costs in rate structures

In any court action under subsection (c), the franchising authority shall demonstrate that the rate structure reflects all costs of the franchise fees.

(e) Decreases passed through to subscribers

Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.

(f) Itemization of franchise fee in bill

A cable operator may designate that portion of a subscriber's bill attributable to the franchise fee as a separate item on the bill.

(g) “Franchise fee” defined

For the purposes of this section—

(1) the term “franchise fee” includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such;

(2) the term “franchise fee” does not include—

(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

(B) in the case of any franchise in effect on October 30, 1984, payments which are required by the franchise to be made by the cable operator during the term of such franchise for, or in support of the use of, public, educational, or governmental access facilities;

(C) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities;

(D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(E) any fee imposed under Title 17.

(h) Uncompensated services; taxes, fees and other assessments; limitation on fees

(1) Nothing in this chapter shall be construed to limit any authority of a franchising authority to impose a tax, fee, or other assessment of any kind on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator.

(2) For any 12-month period, the fees paid by such person with respect to any such cable service or other communications service shall not exceed 5 percent of such person's gross revenues derived in such period from the provision of such service over the cable system.

(i) Regulatory authority of Federal agencies

Any Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section.

47 U.S.C. § 543

Regulation of Cable Rates

* * *

(b) Establishment of basic service tier rate regulations

(1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

(2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission—

- (A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;
- (B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and
- (C) shall take into account the following factors:
 - (i) the rates for cable systems, if any, that are subject to effective competition;
 - (ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;

- (iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;
- (iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;
- (v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;
- (vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and
- (vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

* * *

47 U.S.C. § 544

Regulation of services, facilities, and equipment

(a) Regulation by franchising authority

Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.

(b) Requests for proposals; establishment and enforcement of requirements

In the case of any franchise granted after the effective date of this subchapter, the franchising authority, to the extent related to the establishment or operation of a cable system—

(1) in its request for proposals for a franchise (including requests for renewal proposals, subject to section 546 of this title), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h), establish requirements for video programming or other information services; and

(2) subject to section 545 of this title, may enforce any requirements contained within the franchise--

(A) for facilities and equipment; and

(B) for broad categories of video programming or other services.

* * *

47 U.S.C. § 546

* * *

(c) Notice of proposal; renewal; preliminary assessment of nonrenewal; administrative review; issues; notice and opportunity for hearing; transcript; written decision

- (1) Upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise pursuant to subsection (b), the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period which begins on the date of the submission of the cable operator's proposal pursuant to subsection (b), renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2) to consider whether—
 - (A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;
 - (B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;
 - (C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and
 - (D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.
- (2) In any proceeding under paragraph (1), the cable operator shall be afforded adequate notice and the cable operator and the franchise authority, or its designee, shall be afforded fair opportunity for full participation, including the right to introduce evidence (including evidence related to issues raised in the proceeding under subsection (a)), to require the production of evidence,

and to question witnesses. A transcript shall be made of any such proceeding.

- (3) At the completion of a proceeding under this subsection, the franchising authority shall issue a written decision granting or denying the proposal for renewal based upon the record of such proceeding, and transmit a copy of such decision to the cable operator. Such decision shall state the reasons therefor.

* * *

47 U.S.C. § 552

Consumer protection and customer service

(a) Franchising authority enforcement

A franchising authority may establish and enforce—

- (1) customer service requirements of the cable operator; and
- (2) construction schedules and other construction-related requirements, including construction-related performance requirements, of the cable operator.

* * *

47 U.S.C. § 555

Judicial proceedings

(a) Actions to review determinations by franchising authorities

Any cable operator adversely affected by any final determination made by a franchising authority under section 541(a)(1), 545 or 546 of this title may commence an action within 120 days after receiving notice of such determination, which may be brought in—

- (1) the district court of the United States for any judicial district in which the cable system is located; or
- (2) in any State court of general jurisdiction having jurisdiction over the parties.

* * *

47 U.S.C. § 556

Coordination of Federal, State, and local authority

(a) Regulation by States, political subdivisions, State and local agencies, and franchising authorities

Nothing in this subchapter shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this subchapter.

(b) State jurisdiction with regard to cable services

Nothing in this subchapter shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this subchapter.

(c) Preemption

Except as provided in section 557 of this title, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.

(d) “State” defined

For purposes of this section, the term “State” has the meaning given such term in section 153 of this title.

47 U.S.C. § 1302

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

- (1) the population;
- (2) the population density; and
- (3) the average per capita income.

(d) Definitions

For purposes of this subsection:

(1) Advanced telecommunications capability

The term “advanced telecommunications capability” is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term “elementary and secondary schools” means elementary and secondary schools, as defined in section 7801 of Title 20.

47 C.F.R. § 1.2

Declaratory rulings.

- (a) The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

* * *

47 C.F.R. § 76.42

In-kind Contributions

- (a) In-kind, cable-related contributions are “franchise fees” subject to the five percent cap set forth in 47 U.S.C. 542(b). Such contributions, which count toward the five percent cap at their fair market value, include any non-monetary contributions related to the provision of cable service by a cable operator as a condition or requirement of a local franchise, including but not limited to:
 - (1) Costs attributable to the provision of free or discounted cable service to public buildings, including buildings leased by or under control of the franchising authority;
 - (2) Costs in support of public, educational, or governmental access facilities, with the exception of capital costs; and
 - (3) Costs attributable to the construction of institutional networks.
- (b) In-kind, cable-related contributions do not include the costs of complying with build-out and customer service requirements.

47 C.F.R. § 76.43

Mixed-use rule.

A franchising authority may not regulate the provision of any services other than cable services offered over the cable system of a cable operator, with the exception of channel capacity on institutional networks.